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No. 80-1523

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

FAIRDALE FARMS, INC.,
Petitioner,

v.

YANKEE MILK INC.
and
REGIONAL COOPERATIVE MARKETING AGENCY, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the setting of price for raw milk by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.

2. Whether the Capper-Volstead Act and Section 6 of the Clayton Act give farmers the right to seek, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives, in the absence of competition-stifling or otherwise predatory practices.

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Yankee Milk, Inc. ("Yankee") and Regional Cooperative Marketing Agency, Inc. ("RCMA") respectfully request that this Court deny the Petition of Fairdale Farms, Inc. ("Fairdale") for review of the opinion of the United States Court of Appeals for the Second Circuit entered December 9, 1980.

COUNTERSTATEMENT OF THE CASE

Fairdale's statement of the case contains considerable material of marginal, if any, relevance to the issues presented by the Petition. Fairdale's description of the facts at times goes beyond the record of the case, and many assertions in it remain a matter of dispute between the parties.[1]

Because the brief introductory statement contained in the Court of Appeals' opinion encompasses all facts necessary to a resolution of the issues presented by the Petition, Yankee and RCMA will not attempt a detailed counterstatement of the case, but rather simply quote that portion of the Court of Appeals' opinion, for this Court's convenience of reference, as follows:

> "Plaintiff Fairdale is both a producer and dealer-processor of milk. It is located near Bennington, Vermont and buys and sells in the Vermont, New York and Massachusetts area. Yankee is a milk producers cooperative with a membership of approximately 6,000 New England farmers. In 1973 minimum dairy prices for the northeastern United States, set by the government under the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. §608c(5), were not providing an adequate return to the farmers. In order to secure prices with which their members could live, Yankee and six other area cooperatives organized RCMA as an agricultural cooperative marketing corporation,

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[1] For example, the parties have substantial differences with respect to the actual extent of RCMA's marketing functions and the degree of market power actually possessed by Yankee and RCMA during the relevant time period; Fairdale fails to note that Fairdale continually refused to pay RCMA prices and unilaterally elected to terminate purchases from Yankee members; and Yankee and RCMA strongly contest the damage claims which Fairdale has asserted.

whose primary function was to establish prices for the member farmers' milk. Between 1973 and 1975, these prices were usually higher than the federal order prices. Since August 1975, RCMA has not established an over-order price.

"Until 1974, Fairdale bought a large portion of its milk from Yankee members. However, in 1974 Fairdale objected to paying the over-order price and, when negotiations with defendants proved fruitless, discontinued its purchases from Yankee farmers. In 1976, Fairdale brought this suit charging defendants with price fixing, monopolizing, and attempting to monopolize. Defendants alleged as an affirmative defense that the Capper-Volstead Act, 7 U.S.C. §§291-292, protected them against liability for the conduct of which Fairdale complained. The adequacy of this defense is the issue on appeal." (footnote omitted) (Pet. App. 40a-41a).

ARGUMENT

Introduction

Fairdale makes two arguments in support of its contention that certiorari should be granted. It contends that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court and, further, that the Court of Appeals' decision conflicts with prior decisions of this Court interpreting the Capper-Volstead Act.

Yankee and RCMA respectfully submit that the construction of the Capper-Volstead Act set forth in the Court of Appeals' opinion is so clearly correct that review by this Court is not called for. They further submit that the questions presented for review are settled and need not be reviewed by this Court because the opinion of the Second Circuit below:

1. Does not conflict with the decision of any other circuit, but is in harmony with decisions of the Ninth Circuit and the Federal Trade Commission which recognize the right of cooperatives and associations such as RCMA to establish prices for agricultural products, without more.

2. Does not conflict with any decision of this Court and is entirely consistent with the leading cases decided by this Court construing the Capper-Volstead Act, including *United States v. Borden Co.*, 308 U.S. 190 (1939); *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, *reh. den.* 370 U.S. 965 (1962) and *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978).

I.

THE CAPPER-VOLSTEAD ACT AUTHORIZES PRICE-SETTING BY FARMERS, THEIR ASSOCIATIONS AND COMMON MARKETING AGENCIES OF THEIR ASSOCIATIONS.

Fairdale asserts that a common marketing agency, all of whose member cooperatives are qualified Capper-Volstead associations, organized for the sole purpose of establishing prices for the produce of such members is not entitled to Capper-Volstead protection.[2] While Fairdale's statement of the Questions Presented assigns particular significance to RCMA's alleged role as a Capper-Volstead "marketing agency in common," its fundamental position is that "whatever RCMA is called under the Capper-Volstead Act, it only has a 'right' to price fix if such activity is inherent in other collective activity it performs." See Petition, at footnote 11, page 8. Further, Fairdale ignores the finding of the courts below that RCMA is either an association or a marketing agency in common. (Pet. App. 4a, 43a).

Fairdale's argument has been the subject of litigation in a number of federal forums, including two district courts, two courts of appeals and the Federal Trade Commission, and has in each such case been rejected, without dissent, following careful consideration on the basis of the relevant statutory language, the legislative history of that language and common sense. *See Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-217 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (per curiam),

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[2] As is noted, *supra*, at footnote 1, the parties are in dispute as to the actual extent of RCMA's marketing functions. See the District Court's opinion, at Pet. App. 9a, detailing RCMA functions in addition to price-setting.

cert. denied, 439 U.S. 1090 (1979); *Central California Lettuce Producers Cooperative,* 1977 Trade Reg. Rptr. (CCH) ¶21,337 (FTC), and the decisions below. Further, this Court has ruled that combinations between associations of farmers are protected. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 29 (1962). *See also Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra.* These decisions establish beyond cavil that the setting of prices by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.

II.

THE COURT OF APPEALS CORRECTLY RULED THAT THE CAPPER-VOLSTEAD ACT PERMITS AGRICULTURAL PRODUCERS AND THEIR ASSOCIATIONS AND MARKETING AGENCIES TO COMBINE TO MARKET THEIR PRODUCTS COLLECTIVELY AND, IN DOING SO, TO SEEK AND EXERCISE MONOPOLY POWER, SO LONG AS THEY DO NOT ENGAGE IN COMPETITION-STIFLING OR OTHERWISE PREDATORY ACTIVITIES. ITS DECISION IS ENTIRELY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals examines in considerable detail the relationship between the Capper-Volstead Act and Section 2 of the Sherman Act. Its careful review focuses on the language of Capper-Volstead[3], its legislative history, the long background of congressional

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[3] It should be noted that the Petition, at pp. 4-5, omits in its list of relevant statutory materials Section 2 of the Capper-Volstead Act, 7 U.S.C. §292, a provision quoted and relied upon in significant part by the Court of Appeals in construing the Act. See Pet. App. 44a.

support for the cooperative movement and the course of court and Federal Trade Commission construction of the Act. The court's opinion persuasively demonstrates that Congress intended to allow farmers to acquire, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives.

As the Court of Appeals observed (Pet. App. 52a), this Court has spoken regarding this question in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 24 (1962), where the Court noted with apparent approval that portion of a district court's charge which stated that cooperatives could lawfully have a monopoly of the products in which they dealt, and in *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 465 (1960), where this Court stated that farmers could act together in cooperative associations without the associations as such being illegal under the antitrust laws, "as they might otherwise have been."

Nothing in the history of the Act and its subsequent construction supports Fairdale's position that Capper-Volstead does not protect combination of producers or associations involving the achievement and exercise of monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), upon which Fairdale places principal reliance, does not address, or even touch upon, the scope of the Capper-Volstead exemption. *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911) (Petition, at footnote 7), holding refining industry combination to be unlawful, is precisely the kind of application of the Sherman Act which necessitated the adoption of Capper-Volstead to permit farmer combination to achieve market power. Fairdale completely misses the point of *United States v. Borden Co.*, 308 U.S. 190 (1939), *i.e.* that, while farmer and association combination is permitted, their combination in restraint of trade with non-farmers, who are not protected by Capper-Volstead, is barred. Fairdale ignores the central thrust of the other two Capper-Volstead cases it cites, *Case Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *National*

Broiler Marketing Association v. United States, 436 U.S. 816 (1978). Both cases recognize that Capper-Volstead constitutes a very significant exemption from the operation of the Sherman and Clayton Acts, and, consequently, carefully restrict the availability of its benefits to those parties clearly intended by Congress to be protected by the Act, *i.e.*, farmers and their associations and marketing agencies in common. Unlike those cases, there is here no question but that the acts of formation and combination challenged were carried out exclusively by farmers and their organizations.[4]

This Court has expressly recognized that the Capper-Volstead Act is an "exception to the generality of monopoly prohibitions." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 389 n.14 (1956). The construction of the Capper-Volstead Act contended for by Fairdale contradicts this generally understood purpose of the legislation. The Court of Appeals was correct in rejecting Fairdale's arguments and holding that Capper-Volstead permits the acquisition and exercise of monopoly power by farmers and their cooperatives through the formation, growth and combination of those associations and their common marketing agencies.

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[4] Fairdale contends that the Court of Appeals erred in requiring a showing of "predatory" activity where a Capper-Volstead cooperative is charged with monopolization. To the contrary, the Court's requirement of such showing and its statement that a cooperative may not "use its legitimately acquired monopoly power in such a manner as to stifle or smother competition" are simply a recognition on its part that, as a general proposition, it is necessary for a party to show "anticompetitive conduct" to prevail on a monopolization claim. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271-276 (2d. Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The Court of Appeals' decision does not deal directly or in detail with anticompetitive conduct issues because the District Court certified the case under §1292 as one in which "neither the amended complaint nor the discovery documents reveal action which can be characterized as predatory" (Pet. App., at p. 12a), and which therefore raised the question whether farmers may seek and maintain monopoly power through the formation and combination of Capper-Volstead qualified organizations where they do not, in doing so, engage in anticompetitive activity against other participants in the market.

Acceptance of the novel theories advanced by Fairdale in its Petition would contravene the plain language of the Capper-Volstead Act and Section 6 of the Clayton Act and the prior opinions of this Court, and would destroy the fundamental assumptions upon which farmers themselves have based nearly 60 years of cooperative organization and growth.

CONCLUSION

Respondents respectfully submit that the petition should be denied in all respects.

Respectfully submitted,

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